United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Signed Copy

No. 74-1861

74-1861

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P/S

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SENATE REALTY CORPORATION,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE ORDER OF THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

UNITED STATES COURT OF APPEALS
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STATEMENT OF THE ISSUES PRESENTED

1. Whether the Tax Court abused its discretion in denying the taxpayer's motion for special leave to file a motion to vacate its final decision.

2. Whether, assuming, arguendo, that the Tax Court did abuse its discretion in denying the taxpayer's motion for special leave, the Tax Court had jurisdiction to consider the taxpayer's motion to vacate its decision which had become final some six months previously under Section 7481 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

This is an appeal by Senate Realty Corporation (taxpayer herein) from the March 18, 1974, order of the United States Tax Court (R. 82A)[1/] denying the taxpayer's motion for special leave to file a motion to vacate a decision entered on May 7, 1973 (R. 26A), in which the Tax Court decided that there was a deficiency in income tax due from the taxpayer from the taxable year 1959 in the amount of $117,412.75, plus a penalty in the amount of $58,706.38 (R. 83A). Neither the decision (R. 26A), nor the order of the Tax Court (R. 82A), are reported. A notice of appeal from the order denying the taxpayer's motion for special leave was filed on June 13, 1974. (R. 4A, 83A.) Jurisdiction over this appeal, insofar as it relates to the order entered on March 18, 1974, is conferred upon this Court by Section 7482 of the Internal Revenue Code of 1954.

The facts relevant to this appeal, as reflected by the record, may be summarized as follows:

On February 15, 1966, a statutory notice of deficiency determining a deficiency in the taxpayer's income taxes for taxable year 1959 in the amount of $234,825.50, plus a penalty in the amount of $117,412.75, was mailed to the taxpayer. (R. 11A-12A.) On March 14, 1966, an attorney then representing the taxpayer, Mr. Alvin C. Martin, filed a petition for a

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1/ "R." references are to the separately bound record appendix. "Tr." references are to the transcript of the March 18, 1974 hearing in the Tax Court on the taxpayer's motion for special leave. (R. 3A.)

redetermination of the deficiency in the Tax Court. (R. 5A-9A.) The Commissioner's answer was filed on May 10, 1966 (R. 13A, 14A-20A) and, on June 29, 1966, again through its attorney Martin, the taxpayer filed its reply (R. 21A-22A).

Sometime during early November, 1969, the taxpayer retained Mr. Howard A. Rumpf as its attorney and, on November 13, 1969, advised Martin that the matter pending in the Tax Court would thereafter be handled by Rumpf. (R. 75A.) On November 13, 1969, the taxpayer executed a Form 2848 (Power of Attorney) authorizing Rumpf to represent it before the Internal Revenue Service. (R. 71A-72A.) Finally, on December 8, 1969, an entry of appearance by Mr. Rumpf, on behalf of the taxpayer, was filed with the Tax Court.[2/] (R. 1A.) During the next three years, Rumpf participated in certain conferences with representatives of the Commissioner concerning the possibility of a settlement agreement. (App. Br. 4.) Although the record does not disclose any communications between Rumpf and the taxpayer during this period of time, the record does contain a courtesy letter forwarded to the attorney representing the estate of the taxpayer's former president and principal shareholder, informing him of the status of the settlement negotiations. (R. 78A.) On December 15, 1972, the attorney for the estate requested a meeting with Rumpf

2/ On November 6, 1970, Mr. Rumpf filed a motion for the withdrawal of Mr. Martin as counsel of record. On November 23, 1970, the Tax Court granted that motion. (R. 1A.)

to discuss the possible tax consequences of such a settlement on "the estate and all those concerned with its welfare." (R. 79A.) The record does not disclose that such a meeting ever took place, but, on December 29, 1972, Rumpf wrote the estate's attorney to inform him that the taxpayer's taxable years 1959 and 1960 had come under the Commissioner's scrutiny. (R. 77A.)

On May 7, 1973, the taxpayer, through its attorney Rumpf and together with the Commissioner in Tax Court Docket No. 1258-66, filed a settlement stipulation with the Tax Court in which it stipulated a deficiency in income tax of $117,412.75 and a penalty under Section 6653(b) of the Code in the amount of $58,706.38 for taxable year 1959. (R. 26A-27A.) The decision of the Tax Court entered pursuant to such stipulation was entered on the same day. (R. 2A, 26A-27A.)

On August 20, 1973, two weeks after the decision of the Tax Court had become final, the Commissioner attempted to collect from the taxpayer the amount of the unpaid deficiency, plus penalty and interest. (R. 36A.) The taxpayer, in response, mailed a letter to the Commissioner on August 30, 1973, objecting to the Commissioner's attempt to collect the income tax assessed against the taxpayer. (R. 46A-47A.)

Finally, on February 22, 1974, in conjunction with the submission of an appearance for yet a third counsel and a request to withdraw Rumpf as its counsel of record, the taxpayer filed a motion for special leave to file a motion to vacate the Tax Court's May 7, 1973, decision on the ground that such decision was procurred by fraud upon the court. (R. 3A, 30A-31A.) The fraud alleged in the memorandum submitted in support of the taxpayer's motions was that (p. 5)--

> the decision was obtained by a fraud on the Court when counsel for Senate, as an officer of the Court, after being expressly directed not to settle the claims herein, nevertheless executed an unauthorized stipulation terminating the suit.

In addition to the memorandum submitted in support of the taxpayer's motions, three affidavits and twelve exhibits were lodged with the Tax Court by the taxpayer. (R. 3A, 32A-66A.) An affidavit, with nine exhibits, was filed by Rumpf on March 11, 1974. (R. 67A-81A.) On March 18, 1974, a full hearing on the taxpayer's motion for special leave to file was held (Tr. 1-12) after which the Tax Court denied the taxpayer's motion. (R. 3A, 82A.) This appeal by the taxpayer followed.

SUMMARY OF ARGUMENT

This appeal involves the taxpayer's attempt to file a motion to vacate a decision entered by the Tax Court which had become final some six months earlier under the express provisions of Section 7481(a) of the Internal Revenue Code of 1954. The grounds for the motion to vacate the Tax Court's decision is that the decision was procured as a result of fraud upon the court. The decision sought to be vacated was a stipulated decision entered against the taxpayer as a result of tax deficiencies for its taxable year 1959. A taxpayer, however, that wishes to file a motion to vacate a decision of the Tax Court more than 30 days after that decision is entered must have special leave of the court, and the granting or denial of a motion for such special leave is left to the sound discretion of the court.

The instant taxpayer was granted a full hearing by the Tax Court on its motion for special leave to file a motion to vacate. Thereafter, in the exercise of its discretion, the Tax Court denied the taxpayer's motion. Now, in filing its initial brief, the taxpayer has failed to broach the only real grounds for review, i.e., whether the Tax Court abused its discretion in denying the taxpayer's motion for special leave. It is, however, clear from the record that the Tax Court's action was well justified and should therefore be affirmed.

Assuming, arguendo, that the Tax Court did abuse its discretion in denying the taxpayer's motion for special leave, the court was nevertheless without jurisdiction to grant the taxpayer's motion to vacate its decision. Section 7481 of the Code privides that a decision of the Tax Court becomes final upon the expiration of the time for filing a petition for review. A judicially recognized ground for relaxation of the statutory rule of finality, however, permits the Tax Court to reconsider a final decision where fraud upon the court was perpetrated in the procurement of the decision. The instant taxpayer alleges that fraud was practiced upon the court in the procurement of the decision which it seeks to have vacated. The fraud alleged was that its attorney of record, Mr. Rumpf, entered into the the stipulation upon which the Tax Court's decision was based without authority. The taxpayer has, however, failed to show that there was, in fact, any fraud upon the court. Fraud upon the court has been defined as that species of fraud which does,

or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. No fraud by Rumpf, however, has been shown in the instant case. Under the most favorable interpretation, the most that the taxpayer has shown is that, prior to Rumpf entering into a stipulation with the Commissioner, an attorney representing the estate of the taxpayer's former president and principal shareholder requested that he be consulted prior to the execution of any final settlement. It is clear from the record and well established case law, however, that Rumpf owed no allegence to the estate's attorney. It was the taxpayer that had retained Rumpf to handle the instant controversy and, in that capacity, Rumpf settled the matter. The taxpayer has failed to show that Rumpf perpetrated any fraud upon it and, in absence thereof, the Tax Court was without jurisdiction to vacate its decision.

Accordingly, the Tax Court did not abuse its discretion in denying the taxpayer's motion for special leave, or, assuming arguendo, that it did, it did not have jurisdiction to grant the taxpayer's motion to vacate the decision in any event. The order should be affirmed.

ARGUMENT

I

THE TAX COURT CORRECTLY DENIED THE TAXPAYER'S MOTION FOR SPECIAL LEAVE TO FILE A MOTION TO VACATE ITS FINAL DECISION ESTABLISHING THE TAXPAYER'S TAX LIABILITY FOR THE TAX YEAR IN ISSUE

A. Introduction

Under Rule 162, Rules of Practice and Procedure of the United States Tax Court (Jan. 1, 1974)[3/], Appendix, infra, in order for a taxpayer to file a motion to vacate or revise a Tax Court decision more than 30 days after a decision has been entered, he must have special leave of the court, and the granting or denial of such motion for special leave is within the sound discretion of the Tax Court. Lentin v. Commissioner, 237 F. 2d 5 (C.A. 7, 1956). Cf. Commissioner v. Meldrum & Fewsmith, Inc., 230 F. 2d 283 (C.A. 6, 1956); Hughes v. Commissioner, 104 F. 2d 144 (C.A. 9, 1939). Ordinarily, since such a decision involves the sound discretion of the Tax Court, the only grounds for review would be an allegation of an abuse of discretion on the part of the court. Skenandoa Rayon Corp v. Commissioner, 122 F. 2d 268 (C.A, 2, 1941), cert. denied, 314 U.S. 696 (1941); Lentin v. Commissioner, supra; McCarthy v. Commissioner, 139 F. 2d 20 (C.A. 7, 1943). In seeking this appeal, however, the taxpayer confines itself to a jurisdictional inquiry--i.e., whether the Tax Court had jurisdiction to vacate its final decision. It is the Commissioner's contention that the record does not show

3/ Prior to January 1, 1974, Rule 19(f) of the Rules of Practice, United States Tax Court (Rev. 1958, 1971 ed.) provided: "No motion to vacate or revise a decision may be filed more than 30

that the Tax Court abused its discretion in denying the taxpayer's motion for special leave to file a motion to vacate a decision of the Tax Court which had become "final" some six months previously. Notwithstanding that contention, however, the Commissioner further contends that, under the circumstances of this case, the Tax Court did not have the power to vacate its final decision even if the taxpayer's motion for special leave had been granted. See Argument II, infra.

B. There was no abuse of discretion by the Tax Court in its denial of the taxpayer's motion for special leave

In order for a taxpayer to file a motion to vacate a decision of the Tax Court more than 30 days after such decision is entered, it must have special leave of the court. Rule 162, Rules of Practice and Procedure of the United States Tax Court. The motion for special leave to vacate the Tax Court's decision entered against the taxpayer on May 7, 1973, which had become final on August 6, 1973, was filed on February 22, 1974. (R. 2A-3A, 26A-27A, 30A-31A.) The Tax Court denied the taxpayer's motion for special leave, which denial was within the sound discretion of the court. Lentin v. Commissioner, supra. The only grounds for review of the denial or granting of such a motion is for an abuse of discretion on the part of the court. Skenandoa Rayon Corp. v. Commissioner, supra; Lentin v. Commissioner, supra; McCarthy v. Commissioner, supra.

3/ (continued)
days after the decision has been entered, except by special leave." Rule 162 of the present rules is derived from former Rule 19(f).

In the instant case, the taxpayer has as yet failed to broach the issue of the Tax Court's abuse of discretion in denying its motion for special leave. An examination of its motions, together with supporting memorandum and affidavits that were filed in the Tax Court, fails to convincingly reveal that there were extraordinary circumstances to warrant the granting of such a motion. See Mensik v. Commissioner, 328 F. 2d 147 (C.A. 7, 1964); ARC Realty Co. v. Commissioner, 295 F. 2d 98 (C.A. 8, 1961); McCarthy v. Commissioner, supra. To begin with, the taxpayer demonstrates gross neglect in the time which it allowed to elapse between the date the decision it seeks to vacate became final, August 6, 1973, and the date it filed this action seeking to vacate such final decision, February 22, 1974, representing some six months of inaction. As the court pointed out in Home Furniture Co. v. Commissioner, 168 F. 2d 312, 314 (C.A. 4, 1948):

> The contention of petitioner that the Tax Court committed reversible error in denying petitioner's motion for special leave to file a motion to vacate the Tax Court's decision is quite without merit. This motion was not seasonably made, so that even the entertaining of the motion, much less the granting of it, was entirely a matter of grace on the part of the Tax Court.

See also, Towner v. Commissioner, 182 F. 2d 903 (C.A. 2, 1950), cert. denied, 340 U.S. 912 (1951); MacLeod v. D.C. Transit System, Inc., 283 F. 2d 194 (C.A. D.C., 1960). Even though it is argued by the taxpayer (Br. 7) that it failed to come forward with such a motion out of sheer ignorance of the May 7, 1973, decision, the taxpayer admits (Pr. 6) that on or about August 24,

1973, it received a notice of deficiency from the Commissioner demanding payment of the amount reflected in the stipulated decision--it thereafter waited an additional six months before bringing this action to vacate the decision.

The record shows that at all times during the Tax Court proceeding the taxpayer was represented by counsel of its own choosing, although that counsel has been changed on two separate occasions. (R. 1A, 3A.) Indeed, it was Mr. Rumpf, the counsel specifically chosen by the taxpayer because he had apparently handled other similar cases for litigants known to the taxpayer, who agreed to the stipulated settlement upon which the decision of the Tax Court was based. (R. 75A.) Moreover, the record shows that the taxpayer executed a Form 2848 (Power of Attorney) granting Rumpf the authority to represent it before the Internal Revenue Service (R. 71A-72A), yet the taxpayer claims that "Senate's counsel entered into an unauthorized stipulation compromising the within action" (Br. 18) and that the Tax Court's decision based on the settlement stipulation was procured through fraud (Br. 13-18). The taxpayer would apparently agree, however, that a settlement agreement entered into by counsel of record, absent fraud, should not be set aside. United States v. Beebe, 180 U.S. 343 (1901); Ricketts v. Pennsylvania R. Co., 153 F. 2d 757 (C.A. 2, 1946); Saigh v. Commissioner, 26 T.C. 171 (1956). If settlement stipulations filed in the Tax Court involving corporate taxpayers were permitted to be attacked by charges that counsel of record with full authority to represent the corporation before

the Internal Revenue Service had not consulted with all "interested" parties (i.e., the estates of deceased shareholders) prior to executing the settlement agreement, doubt would be cast upon literally thousands of settlements. See 9 Mertens, Law of Federal Income Taxation (Rev.), Sec. 50.107; Spector v. Commissioner, 42 T.C. 110 (1964). See also Minneci v. Commissioner, 368 F. 2d 161 (C.A. 7, 1966). Nowhere in the record does it appear that there was any fraud involved in the negotiations between Rumpf and the Commissioner, or between Rumpf and the taxpayer.

There has been no persuasive showing in the motions, memorandum, affidavits, or exhibits presented by the taxpayer in this case that fraud of any nature was practiced by its counsel of record, Rumpf. At most, the materials presented by the taxpayer demonstrate an example of an attorney that rejected interference from third parties (the estate's attorney (R. 79A)) during negotiations leading up to and including a settlement. Nowhere, however, do we find any evidence that Rumpf acted in bad faith, that Rumpf was specifically directed by the taxpayer, Senate Realty Corporation, to terminate settlement negotiations, that Rumpf possessed any fraudulent intent in his dealings with the Commissioner or that the taxpayer made any effort to inform the Commissioner or the Tax Court that Rumpf's authority had been specifically limited the exclude the right to compromise its tax liability. Indeed, the Tax Court recognized this void in the taxpayer's presentation during

the full hearing on its motion for special leave (Tr. 1-12). No abuse of discretion on the part of the Tax Court having been shown, its denial of the motion for special leave should be sustained.

II

THE TAX COURT WAS WITHOUT JURISDICTION TO VACATE ITS FINAL DECISION

A. The Tax Court's decision became final when the taxpayer failed to file either a motion to vacate and set aside the stipulated decision within 30 days, or a notice of appeal within 90 days, following the entry of the court's decision

A stipulated decision settling the taxpayer's liability for federal income taxes and penalties was entered on May 7, 1973. (R. 2A, 26A.) Under Section 7481(a)(1) of the Internal Revenue Code of 1954, Appendix, infra, a decision of the Tax Court becomes final if no notice of appeal is filed within the period allowed by statute. The time allowed for filing such notice of appeal is prescribed by Section 7483 of the Internal Revenue Code of 1954, Appendix, infra. That section provides that notice of appeal for review of a Tax Court decision must be filed within 90 days after the decision is entered. The running of the time for filing such notice of appeal, however, can be stayed by the timely filing of a motion to vacate or revise a decision made pursuant to the Tax Court's Rules of Practice. Rule 13(a), Federal Rules of Appellate Procedure.

Thus, under Section 7481(a)(1) and Section 7483, the decision which the taxpayer now seeks to have vacated became "final" on August 6, 1973, approximately six months before the taxpayer attempted to revive it by filing its motion for special leave to file a motion to vacate the decision of the Tax Court. The finality provisions regarding Tax Court decisions have, however, traditionally been strictly construed. This is clearly a necessity, since the entire assessment and collection procedure is dependent upon the timing of such finality.[4/] Indeed, it has been held that even the Supreme Court may not reopen a Tax Court decision once it has become final under these provisions. This is so even though reopening would have been permissible under the Supreme Court's own rulings, absent the finality provisions. R. Simpson & Co. v. Commissioner, 321 U.S. 225 (1944); Helvering v. Northern Coal Co., 293 U.S. 191 (1934). The cases are legion which state the principle that once a decision of the Tax Court is final, neither the Tax Court, nor any other court has jurisdiction to reconsider the decision.

4/ In the case of a tax deficiency, the Commissioner is required to serve a notice of deficiency upon the taxpayer (Section 6212(a) of the Internal Revenue Code of 1954) and he is prohibited from making an assessment of such deficiency until the expiration of the 90 days within which the taxpayer may commence a proceeding in the Tax Court, and if a petition is filed with the Tax Court, no assessment may be made until the decision of the Tax Court has become final (Section 6213 of the Code). Additionally, if the Tax Court, upon redetermination, finds a deficiency, the deficiency shall be assessed and paid upon notice and demand when the Tax Court's decision has become final. Sec. 6215 of the Code. However, if the taxpayer seeks review of the Tax Court's decision, the deficiency determined by the Tax Court may be assessed and collected before such decision becomes final, unless the taxpayer files a bond on or before the time the notice of appeal is filed to stay assessment and collection. Sec. 7485 of the Internal Revenue Code of 1954.

Lasky v. Commissioner, 352 U.S. 1027 (1957), aff'g per curiam, 235 F. 2d 97 (C.A. 9, 1956); Jefferson Loan Co. v. Commissioner, 249 F. 2d 364 (C.A. 8, 1957); Kutner v. Commissioner, 245 F. 2d 462 (C.A. 7, 1957); Lentin v. Commissioner, supra; Denholm & McKay Co. v. Commissioner, 132 F. 2d 243 (C.A. 1, 1942); Smith v. Commissioner, 67 F. 2d 167 (C.A. 4, 1933). But see, Wilson v. Commissioner, 474 F. 2d 600 (C.A. 5, 1973), cert. denied, 412 U.S. 950 (1973). This Court, accordingly, is without jurisdiction to review the decision of the Tax Court in this case. See Lasky v. Commissioner, supra; Vibro Mfg. Co. v. Commissioner, 312 F. 2d 253 (C.A. 2, 1963); Industrial Addition Ass'n v. Commissioner, 141 F. 2d 636 (C.A. 6, 1944), rev'd on other grounds, 323 U.S. 310 (1945); McCarthy v. Commissioner, 139 F. 2d 20 (C.A. 7, 1943); Commissioner v. Realty Operators, 118 F. 2d 286 (C.A. 5, 1941); Virginia Lincoln Furniture Corp. v. Commissioner, 67 F. 2d 8 (C.A. 4, 1933).

B. Under the circumstances of this case, the Tax Court lacked jurisdiction to vacate its "final" decision because the taxpayer failed to show that there was "fraud upon the court"

As pointed out by the taxpayer (Br. 7-11), one exception to the rule of finality has received judicial enunciation. That exception permits the Tax Court to reopen proceedings, but only where it is sure that there has been "fraud upon the court." In Kenner v. Commissioner, 387 F. 2d 689, 690-691 (1968), the Seventh Circuit gave its approval to this exception when it stated:

> It has been settled that such finality precludes any subsequent reconsideration by the tax court, at least on such grounds as mistake, newly discovered evidence, and the like. * * *
>
> If any room has been left for a relaxation of the statutory finality in order to permit the Tax Court to consider whether its decision is the product of a fraud upon it, that is all that has been left. * * * We think, however, that it can be reasoned that a decision produced by fraud on the court is not in essence a decision at all, and never becomes final. 5/

Even so, that court found that the allegations before it (i.e., allegations of misconduct of counsel in, inter alia, failing to represent the taxpayer's best interests vigorously and entering into a stipulation with the Commissioner) were not of a nature to amount to allegations of fraud upon the court. 6/

Similarly, another appellate case reaching the issue of whether a Tax Court decision may be reopened for fraud upon the court was decided by the Ninth Circuit in Toscano v. Commissioner, 441 F. 2d 930 (1971). There the court, relying

5/ Both sides in Kenner had noted the Supreme Court's holding in Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238 (1944). There, a patentee's attorney, through deliberate misrepresentations, had caused the Patent Office and the Third Circuit to heavily rely upon a spurious article printed in a trade journal. The Supreme Court held that conduct sufficient to constitute fraud on the court and to reopen the judgment.

6/ "'Fraud upon the court' should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjuding cases that are presented for adjudication." 7 Moore's Federal Practice (2d ed.), p. 515.

on Kenner v. Commissioner, supra, and Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238 (1944), endorsed the view that a decision procured by fraud upon the court could be reopened. On the ground that the allegation in Toscano (i.e., the taxpayer's signature was allegedly forged on a joint return), if true, could amount to such fraud, the case was remanded to the Tax Court for a further hearing.

In Stickler v. Commissioner, 464 F. 2d 368 (C.A. 3, 1972), the taxpayers complained that they had been drawn into filing a stipulation with the Tax Court by false representations of Internal Revenue agents. In affirming the denial of the Tax Court to withdraw and reform the stipulation, the Third Circuit held that neither the record nor the taxpayer had shed any light on the allegations of fraud. Indeed, the court went on to say that taxpayers could not have been induced to sign a stipulation because of alleged fraudulent representations by the agents, since the taxpayers were in the best position to determine if the representations were accurate. Since the burden of showing fraud fell upon the taxpayers, their failure to specifically demonstrate fraud upon the court left the court with no alternative but to affirm.

Finally, in Flood v. Commissioner, 468 F. 2d 904 (C.A. 9, 1972), cert. denied, 411 U.S. 906 (1973), the taxpayer filed a motion for special leave to vacate two Tax Court decisions which had become final. There the court's decisions had been based upon settlement stipulations signed by the taxpayers' attorney of record. The Ninth Circuit held that, absent a

specific showing of fraud by the taxpayers as having been perpetrated by their attorney, the Tax Court did not abuse its discretion in denying the motion for special leave. Although the attorney in Flood had been given a written general power of attorney, the court's refusal to entertain the taxpayers' unfounded general allegations of fraud on the part of their counsel is equally applicable in the instant case.

We have no doubt that in a true case of a decision procured by fraud upon the court a decision which would otherwise be final may be reopened. As is discussed in Kenner, Toscano, Stickler, Flood, and 7 Moore's Federal Practice, supra, however, the term "fraud on the court" has yet to be defined with any degree of precision. It appears clear that the term has always been interpreted as at least requiring some sort of scheme to defile the court, or to prevent its processes from fairly adjudicating an issue. The taxpayer in the instant case, however, has failed to show that there was indeed any fraud involved in the proceedings before the Tax Court and whether such alleged fraud constituted "fraud upon the court."

In Kenner v. Commissioner, supra, p. 691, the court, quoting from 7 Moore's Federal Practice, supra, p. 512, that " 'Fraud upon the court' should, we believe, embrace only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for

adjudication. In England v. Doyle, 281 F. 2d 304 (1960), the Ninth Circuit held that, in order to set aside a judgment because of "fraud upon the court", it is necessary to show an unconscionable plan or scheme designed to improperly influence the court in its decision. "Fraud upon the court" then, has been limited to fraud that is practiced by the opposing party and connected with the court itself (as in the examples given in 7 Moore's Federal Practice, supra, p. 510), such as bribery or other corruption of the court, or by a member of the court participating in the decision, or by employment of counsel to somehow "influence" the court. In a nutshell, it is an attack on the institution of the court itself preventing it from adjudicating impartially. Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F. 2d 798 (C.A. 2, 1960).

Critical to the instant taxpayer's appeal, however, an allegation of fraud must be pleaded with special care and particularity. The facts constituting the alleged fraud must be definitely and positively alleged (Independence Lead Mines Co. v. Kingsbury, 175 F. 2d 983 (C.A. 9, 1949)) and the moving party has the burden to establish fraud by clear and convincing evidence (England v. Doyle, supra; Atchison, Topeka and Santa Fe Railway Co. v. Barrett, 246 F. 2d 846 (C.A. 9, 1957)). According to the taxpayer (Br. 5-6), the fraud in the instant case occurred when its attorney Rumpf entered into a stipulation with the Government concerning the taxpayer's federal income tax liability for taxable year 1959. Such action, the taxpayer

complains, was without authority and therefore fraudulent. The mere allegation of fraud, however, is not enough. See Serzysko v. Chase Manhattan Bank, 461 F. 2d 699 (C.A. 2, 1972), cert. denied, 409 U.S. 883 (1972), rehearing denied, 409 U.S. 1029 (1972); Kupferman v. Consolidated Research & Mfg. Corp., 459 F. 2d 1072 (C.A. 2, 1972). Thus, while the Tax Court has the power to vacate a final decision procured from it through fraud practiced upon it, the taxpayer in the case at bar has failed to show any general evidence of fraud, or to show any specific acts by Rumpf sufficient to constitute a "fraud upon the court" and require the Tax Court to vacate its decision against Senate Realty Company, entered May 7, 1973.

An examination of the taxpayer's motions, its affidavits, and exhibits lodged with the court in this case fails to substantiate any of the taxpayer's allegations relating to the integrity of the decision itself. Indeed, the statements and actions evidenced in the affidavits filed on behalf of the taxpayer place in serious doubt the veracity of the allegations made by the taxpayer. An essential element of fraud is a clear intent to deceive. Magee v. Manhattan Life Ins. Co., 92 U.S. 93 (1875); Miller v. United States, 120 F. 2d 968 (C.A. 10, 1941). The materials submitted by the taxpayer in support of its motions do not evidence a fraudulent intent on the part of its attorney Rumpf toward the taxpayer. Indeed, in absence of proof to the contrary, all of the evidence indicates that Rumpf conscientiously bargained for and obtained an equitable settlement of the taxpayer's tax liability for 1959. (R. 67A-81A.)

As pointed out by the taxpayer (Br. 15), it is generally true that an attorney may litigate but may not settle controversies without the consent of his client. In United States v. Beebe, 180 U.S. 343, 352 (1901), the Supreme Court, citing Chief Justice Marshall in Holker v. Parker, 7 Cranch 436, 444-445 (1813), set forth the following general maxim: " the utter want of power of an attorney * * * to compromise his client's claim, cannot * * * be successfully disputed." See also Jacob v. City of New York, 119 F. 2d 800 (C.A. 2, 1941). The Chief Justice, however, limited the application of the rule in the following terms (7 Cranch, pp. 452-453):

> Although an attorney-at-law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying, that the compromise, being unauthorized, and being, therefore, in itself, void, ought not to bind the injured party. (Emphasis added.)

In the case at bar the settlement was not inadequate or improvident under the circumstances. As a result of Rumpf's endeavors, the Commissioner's proposed tax deficiency of approximately $352,000 was reduced to approximately $176,000. (R. 11A-13A, 26A, 78A.) We submit that the taxpayer's attorney Rumpf was hired for his particular expertise in the tax area and was therefore given

considerable discretion in representing the taxpayer before the Internal Revenue Service and the Tax Court (R. 75A.)[7/] Indeed, this capacity is documented by both the power of attorney executed by the taxpayer (R. 71A-72A) and the entry of Rumpf's appearance on behalf of the taxpayer before the Tax Court (R. 1A). Having once vested Rumpf with such apparent authority to act on its behalf, the taxpayer cannot now be heard to complain that he did so unwisely. Moreover, nowhere do we find a termination of Rumpf's representation of the taxpayer until February 22, 1974, some six months after the Tax Court's decision had become final. (R. 3A.) The taxpayer has failed to introduce any evidence that Rumpf was not acting under the direction of the taxpayer--or, indeed, did not receive specific endorsement and approval of his actions from the taxpayer following the settlement.

Nor may the taxpayer now point to correspondence from the estate of the now-deceased former president and principal shareholder of the taxpayer. (R. 78A-79A.) Rumpf's client was, after all, the taxpayer. He was retained by the taxpayer and paid by the taxpayer. The desires of the estate's attorney and beneficiaries were of no consequence to Rumpf. It was the taxpayer who hired Rumpf, the taxpayer who could properly direct his actions, and now it is the taxpayer who may not

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7/ The taxpayer's inequivocal confidence in Rumpf is further demonstrated by the fact that courtesy copies of the letter terminating the employment of its initial counsel Martin was sent not only to Rumpf, but to the current president of the taxpayer, Mr. Sedacca. (R. 75A.)

avoid the acts of its freely choosen counsel. Davis v. United Fruit Co., 402 F. 2d 328 (C.A. 2, 1968). Any other notion would be inconsistent with our system of representative litigation. Link v. Wabash Railroad Co., 370 U.S. 626 (1962).

Viewing the present case in light of Toscano v. Commissioner, supra, as urged by the taxpayer (Br. 18), it is evident that there is no basis for reopening the taxpayer's Tax Court decision. One obvious difference between the instant case and Toscano is that here there was a full hearing held by the Tax Court on the taxpayer's motion for special leave, while this was not done in Toscano. Beyond that, in Toscano, assuming the truth of that taxpayer's allegations, she had been made liable for taxes on the basis of joint returns when she was never married, had not freely signed the returns, and had never been aware of nor represented in the Tax Court proceedings which had resulted in the final stipulated decisions which she was seeking to have reopened. In sum, the taxpayer in Toscano had never had her day in court. This is clearly not the case here. The instant taxpayer was aware of the proceedings. It hired Martin initially to represent it and later, in 1969, hired Rumpf, giving the latter a power of attorney to represent it before the Internal Revenue Service, in addition to the authority which Mr. Rumpf had by reason of being the taxpayer's counsel of record in the Tax Court proceedings. (R. 1A, 75A.) The taxpayer was well aware of the negotiations leading up to the settlement. (R. 74A.) As pointed out previously, the taxpayer obtained substantial

benefits from the settlement. The Commissioner's proposed deficiency of approximately $352,000, including penalties, was reduced, pursuant to the stipulation, to approximately $176,000, including penalties. (R. 11A-13A, 26A, 78A.)

From the above, it is evident that the stipulated decision in the Tax Court did not result in any manner from a fraud upon the court. What is rather presented is a taxpayer, under new leadership, that apparently is not satisfied with a binding stipulation entered into while the corporation was under the leadership of its now deceased president and major shareholder. While this is understandable, it cannot be a basis for reopening a final Tax Court decision.

The taxpayer was granted a full hearing by the Tax Court on its motion for special leave.[8/] (Tr. 1-12.) The Tax Court, after a presentation by the taxpayer, denied its motion. (R. 82A.) Its action can be reversed only by a showing by the taxpayer that the court abused its discretion. Skenandoa Rayon Corp. v. Commissioner, 122 F. 2d 268 (C.A. 2, 1941), cert. denied, 314 U.S. 696 (1941); Mensik v. Commissioner, supra; Home Furniture Co. v. Commissioner, supra. The taxpayer has failed to carry its burden. From the facts discussed above, it is clear that there was no abuse of the Tax Court's discretion in denying the taxpayer's motion for special leave, and thus its order should be affirmed.

8/ As stated previously, the then existing Rule 19(f), Rules of Practice, United States Tax Court (Rev. 1958, 1971 ed.), states that "No motion to vacate or revise a decision may be filed more than 30 days after the decision has been entered, except by special leave." Thus it was necessary for the Tax Court to have granted this motion before the motion to vacate could be filed and considered.

CONCLUSION

For the foregoing reasons, the order of the Tax Court should be affirmed.

Respectfully submitted,

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NOVEMBER, 1974.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 1st day of November, 1974, in an envelope, with postage, properly addressed to him as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7481. DATE WHEN TAX COURT DECISION BECOMES FINAL.

(a) [as redesignated and amended by Sec. 960(h)(1)(A), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] Reviewable Decisions.--Except as provided in subsection (b), the decision of the Tax Court shall become final--

(1) Timely notice of appeal not filed.--Upon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time; * * *

* * *

SEC. 7483 [as amended by Sec. 959(a), Tax Reform Act of 1969, supra]. NOTICE OF APPEAL.

Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

Rules of Practice and Procedure of the United States Tax Court (Jan. 1, 1974):

RULE 162. Motion to Vacate or Revise Decision. Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit.

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